SUBJECT INDEX

PAGE

Brief of Amici Curiae 2-6

TABLE OF CITATIONS

Broderick v. Rosner, 294 U. S. 629, 641 4

Massachusetts v. Missouri, 308 U. S. 1 ..... 2, 3, 4

Milwaukee County v. M. E. White Co., 296 U. S. 268 ..... 2, 3, 4

Moore v. Mitchell, 281 U. S. 18, 24 3

United States v. Carver, 260 U. S. 482, 490 3

In the Supreme Court of the United States

OCTOBER TERM 1942

RECORD NO. 413

PEOPLE OF THE STATE OF CALIFORNIA, ON THE RELATION OF CHARLES J. McCOLGAN, AS STATE FRANCHISE TAX COMMISSIONER, PETITIONER

vs.

JOHN HOWARD BRUCE, RESPONDENT

BRIEF OF THE STATES OF MICHIGAN, MARYLAND, MAINE, KANSAS, NEBRASKA, OHIO, IOWA, CONNECTICUT, VIRGINIA, NEW HAMPSHIRE, INDIANA, IDAHO, LOUISIANA, FLORDIA, MISSISSIPPI, VERMONT, NEW MEXICO AND COLORADO, AMICI CURIAE, IN SUPPORT OF PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

BRIEF OF AMICI CURIAE

This brief of *amici curiae* is in support of a petition for rehearing in the above entitled matter of the order of this court issued November 9, 1942, denying a petition for certiorari.

This brief is submitted in the belief that several significant and important questions of law are involved which require final determination by this court.

An important problem in state tax administration is that of enforcing payment from persons who have incurred tax liability and then departed from the taxing state.

In the present condition of the law, the states are uncertain as to the remedies available and it will be of great benefit if the matter is clarified.

In *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268, this court held that a federal district court in one state had jurisdiction to entertain a suit upon a judgment for taxes obtained in the taxing state. But this does not meet the problem when it is impossible to obtain a personal judgment in the taxing state against the person subject to tax.

In *Massachusetts* v. *Missouri,* 308 U. S. 1, this court declined to entertain jurisdiction of an original proceeding by a state against citizens of another state for the enforcement of taxes.

However, in both *Milwaukee County* v. *M. E. White Co., supra,* and *Massachusetts* v. *Missouri, supra,* this court employed language which seems to imply that the states may sue in federal district courts in other

states for the enforcement of tax claims. But in the instant case the Circuit Court of Appeals for the Ninth Circuit has held that federal district courts do not have jurisdiction to entertain such suits.

Unless certiorari is granted in this case, the states will be uncertain as to their right to sue in federal district courts situated in other states, for this court frequently has observed that the denial of certiorari does not import an expression of opinion upon the merits of the case (*United States* v. *Carver,* 260 U. S. 482, 490) and the rule announced by the Ninth Circuit is not binding upon the other circuits. Yet, it is desirable, if possible, to avoid protracted litigation and remove the uncertainty now existing.

Further uncertainty as to the remedies available to the states arises from the fact that in *Milwaukee County* v. *M. E. White Co., supra,* page 272, and again in *Massachusetts* v. *Missouri, supra,* page 20, this court has declared that the objection that the courts in one state will not entertain a suit to recover taxes due to another goes not to the jurisdiction but to the merits and raises a question which federal district courts are competent to decide, but this court has expressly left the question undecided in *Moore* v. *Mitchell,* 281 U. S. 18, 24, and again in *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268, 275. It is a matter of considerable importance to the states that this question be decided.

Assuming that actions may be brought in federal courts of one state to recover taxes due another state, the law also is unsettled regarding in whose name such an action may be brought. In *Moore* v. *Mitchell,* 281

U. S. 18, this court held that a county treasurer did not have capacity to sue for taxes in federal courts in another state. Yet in *Broderick* v. *Rosner,* 294 U. S. 629, 641, the Superintendent of Banks of the State of New York was held to have capacity to sue in the courts of another state to enforce stockholders' liability. In *Milwaukee County* v. *M. E. White Co., supra,* a county was permitted to sue in the federal courts of another state on a tax judgment although that judgment for the most part was for taxes due a state. Yet, in the instant case, the Circuit Court of Appeals has held that an action in the name of the People of the State of California on the relation of the State Franchise Tax Commissioner cannot be brought in the federal district court of another state, despite the apparent suggestion in *Massachusetts* v. *Missouri* that such an action could be brought. It will be most helpful if this situation can be clarified.

Moreover, if a state may not bring original proceedings in this court to enforce payment of taxes (*Massachusetts* v. *Missouri, supra*) and if the decision of the Circuit Court of Appeals in the instant case is permitted to stand, holding that district courts do not have jurisdiction of such actions, the effect is to deny a state any access to the federal courts for the bringing of suits against citizens of other states to enforce tax claims. The question whether such a result is consistent with the constitutional purpose in providing a federal judiciary is of such fundamental importance that an expression of opinion by this court seems warranted.

The present uncertainty as to the enforcement reme-

dies available to the states tends to promote tax evasion. *Amici curiae* take this means of respectfully urging that certiorari be granted in the instant case in order that existing uncertainties in the field of state tax administration may be eliminated.

Respectfully submitted,

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